

ORAL ARGUMENT REQUESTED

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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS OF TEXAS

ALLEN BRAY PUGH

Appellant

v.

THE STATE OF TEXAS,

Appellee

On Appeal from the 42nd District Court
of Taylor County, Texas
Cause No. 26,281-A
(Hon. James Eidson)

and

Cause No. 11-17-00216-CR
from the
THE COURT OF APPEALS FOR THE ELEVENTH JUDICIAL DISTRICT
EASTLAND, TEXAS

PETITION FOR DISCRETIONARY REVIEW

FREDERICK T. DUNBAR
State Bar #24025336
7242 Buffalo Gap Road
Abilene, Texas 79606
Ph. (325) 428-9450
Fax (325) 455-1912
rickdunbar2013@gmail.com

JEFFREY A. PROPST
State Bar #24064062
P.O. Box 3717
Abilene, Texas 79604
Tel. (325) 455-1599
Fax (325) 455-1507
jeff@keithandpropst.com

IDENTITY OF TRIAL COURT, PARTIES AND COUNSEL

In accordance with Rule 68.4 of the Texas Rules of Appellate Procedure, the following is a list of names and addresses of the trial court, parties and counsel:

Trial Court: Hon. James Eidson
42nd Judicial District
Taylor County, Texas
300 Oak Street
Taylor County Courthouse
Fourth Floor
Abilene, Texas 79602

Appellant: Allen Bray Pugh

**Trial Counsel for
Appellant:** Kevin Willhelm
Attorney At Law
P.O. Box 3536
Abilene, Texas 79604

**Appellate Counsel
for Appellant:** Jeffrey A. Propst
Keith and Propst, PLLC
226 Pine St., Ste. B
Abilene, Texas 79601

Frederick Dunbar
7242 Buffalo Gap Road
Abilene, Texas 79606

Trial Counsel for the State: Arimy Beasley
Joseph Zachary Gore
Taylor County Courthouse
300 Oak Street
Abilene, Texas 79602

**Appellate Counsel
for the State:**

Britt Lindsey
Taylor County Courthouse
300 Oak Street
Abilene, Texas 79602

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Issue One

The Court of Appeals erred in holding the trial court acted within its discretion when it allowed the State to introduce three animations to the jury which depicted the decedent Delorme as unarmed and stationary, contrary to the evidence.

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PETITION FOR DISCRETIONARY REVIEW

**TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL
APPEALS:**

Allen Bray Pugh, (hereinafter sometimes referred to as “Appellant,”) submits
this Brief of Appellant, and would respectfully show unto the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested as this case involves the application of important Court of Criminal Appeals precedent.

STATEMENT OF THE CASE

Pugh was charged by indictment with the murder of William Delorme with his motor vehicle. (CR: 10). The offense was alleged to have been committed on October 9, 2014. (CR: 10). On August 16, 2018, the jury found Pugh guilty, having been instructed on and rejecting self-defense. (CR: 38, 50). Punishment, assessed by the jury on August 17, 2017, was confinement for fifty years in the Texas Department of Criminal Justice-Institutional Division and a \$10,000.00 fine. (CR: 57). Pugh now respectfully brings this appeal.

STATEMENT OF PROCEDURAL HISTORY

Pugh appealed to the Eleventh Court of Appeals at Eastland, Texas. In an opinion authored by the Honorable Justice Keith Stretcher, released on August 30, 2019, the Court affirmed Pugh's conviction. (Apx. A).

GROUND FOR REVIEW

Issue One

The Court of Appeals erred in holding the trial court acted within its discretion when it allowed the State to introduce three animations to the jury which depicted the decedent Delorme as unarmed and stationary, contrary to the evidence.

ARGUMENT AND AUTHORITIES

With respect to animations involving animate objects, the Texas Court of Criminal Appeals has said, " [a]ny staged, re-enacted criminal acts or defensive issues involving human beings are impossible to duplicate in every minute detail and are therefore inherently dangerous, offer little in substance and the impact of re-enactments is too highly prejudicial to insure the State or the defendant a fair trial." *Miller v. State*, 741 S.W.2d 382, 388 (Tex.Crim.App.1987).

An appellate court reviews a trial court's ruling on the admissibility of such an exhibit under an abuse of discretion standard. *Coble v. State*, 330 S.W.3d 253, 272 (Tex.Crim.App.2010). The appellate court must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex.Crim.App.2000).

In *Hamilton v. State*, 399 S.W.3d 673, 680 (Tex.App. - Amarillo 2013), *aff'd*, 428 S.W.3d 860 (Tex. Crim. App. 2014), *subsequent pet. ref'd.*, prosecutors offered an animation that purported to recreate the events as seen by an eyewitness.

The animation showed three, nondescript, identical, 3-D figures standing next to a non-descript single level box-like object, representing a building. *Id.* The figures paused for approximately five seconds and then disappeared around the corner. *Id.* Loud gunshots were then heard on the animation, and one of the three figures ran back past. *Id.* at 680-681. Although the eyewitness stated that the

animation accurately depicted what she saw, the Court of Appeals held that the trial court abused its discretion in admitting the animation. *Id.* at 684. The court noted that “[n]othing in the record . . . supports many of the details contained in the animation.” *Id.* “Those details were provided by nothing more than pure speculation on [the sponsoring officer’s] part.” *Id.* The Court of Appeals also noted that nothing in the case law approves the use of speculative animations showing anything more than “documented facts.” *Id.* at 683.

In this case, Pugh was accused of running Delorme over with his car in a bar parking lot. Pugh and his friend Jesse Hambrick had intervened when Delorme had threatened a female bartender, Alex Schkade, with a knife. (RR5: 181). After having left the bar earlier, Delorme came back from across the street, causing apprehension in Pugh’s friend Jerry Anderson leading to Anderson’s prompt departure. (RR5: 211)

According to Pugh, Delorme came running across the street towards Appellant and Anderson. (RR6: 190). It is undisputed that Pugh ran Delorme over with his car, killing him. (RR5: 216; R.R.6: 193, 215). According to Pugh, Delorme was coming at him with a substantial knife when he floored it. (RR5: 193, 195).

The animation in this case, created and proffered by Officer Tyson Kropp, depicts Delorme as stationary and unarmed, as opposed to approaching Appellant

with a substantial knife. SX-69. This is highly speculative on Kropp's part. The depiction of Delorme as stationary and unarmed is not merely a depiction of "documented facts," of which case law approves. See *Hamilton*, 399 S.W.3d at 683. Much worse than that, the depiction of Delorme actually contradicts the only testimony and evidence about Delorme's behavior, his return to the scene, and the knife in the parking lot. See, e.g., (SX-22), (SX-24) (photographs of knife and sheath at scene); (RR5: 211) (Delorme coming back across the street creating apprehension in Anderson); (RR6: 190) (Delorme running across the street towards Appellant and Anderson); (RR5: 181) (Hambrick's testimony that he saw Delorme "with a knife going over the bar trying to get to the bartender").

Clearly, this is exactly the kind of animation about a human's appearance, movement, and behavior that are "impossible to duplicate in every minute detail and are therefore inherently dangerous." *Miller*, 741 S.W.2d at 388; *Hamilton*, 399 S.W.3d at 683.

Kropp testified that the animation showed that Pugh had sufficient control over the vehicle to negotiate obstacles and had accelerated before striking Delorme (RR6: 172-175). That Appellant had control of the vehicle and accelerated on a certain path when striking Delorme was set forth by expert witness testimony, photographs and diagrams and was readily comprehensible to the jury without this animation. This re-enactment was too highly prejudicial to insure the defendant a

fair trial. *Miller*, 741 S.W.2d at 388. The admission of the animations was error and was not within the zone of reasonable disagreement.

The Court of Appeals cited four intermediate appellate cases in which animations had been allowed. (Apx. A, p.5-6). However, in none of these cases had the animation depicted human action.

Venegas v. State, 560 S.W.3d 337, 347–48 (Tex. App.— San Antonio 2018, no pet.) (vehicles); *Castanon v. State*, No. 08-15-00225-CR, 2016 WL 6820559, at *3 (Tex. App.—El Paso Nov. 18, 2016, no pet.) (not designated for publication) (same); *Murphy v. State*, No. 11-10-00150-CR, 2011 WL 3860444, at *2 (Tex. App.—Eastland Aug. 31, 2011, no pet.) (mem. op., not designated for publication) (same); *Mendoza v. State*, No. 13-09-0027-CR, 2011 WL 2402045, at *14–15 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op., not designated for publication)(scene of incident).

While expressing agreement with the premise of *Miller*, the Court of Appeals held the instant animation was justified because it involved both animate and inanimate objects and the movement of the inanimate objects at least was based on objective data. (Apx. A, p. 6).

However, Pugh has not found in *Miller* or any other Court of Criminal Appeals decision such an exception to the proscription against depicting human action in animation. To the extent this Court would acknowledge such an exception

where both inanimate and animate objects are depicted, such as a pedestrian/vehicle case, Pugh would respectfully invite this Court to delineate the parameters of such an exception. At any rate, as noted above, the matters in this case were adequately spelled out in pictures, diagrams, and expert testimony that the demonstrative value of such an animation would not warrant an exception in this case, given the highly prejudicial effect of Delorme's depiction.

The Court of Appeals further reasoned that the animation did not attempt to portray Delorme's actions prior to being run over by Appellant's pickup. (Apx. A, p. 6). Respectfully, this is not accurate. Kropp made no such qualification in his comments on the animation to the jury. Further, Delorme is clearly depicted as stationary and unarmed while the vehicle makes its path in the animation. (SX-69).

Whether the decedent was armed and approaching the accused or unarmed and stationary is vital to a self-defense/murder case, and the trial court erred in allowing the State to present to the jury three animations that incorrectly depict these facts, especially when the proffering witness has the dual cloaks of authority as an expert and a police officer. The Court of Appeals erred in holding otherwise.

PRAYER FOR RELIEF

This was a case in which the jury rejected a self-defense instruction with strong supporting evidence. The jury did so after watching three animations which depicted the decedent Delorme as unarmed and stationary. Despite the Court of

Criminal Appeals' proscription of the depiction of human beings and their actions in an animation, the Court of Appeals held the trial court did not err in their admission. Either the Court of Appeals has contradicted clearly established precedent from this Court, or has articulated an exception to *Miller* on which this Court has not sounded its opinion. Either way, Court of Criminal Appeals review of this important matter is warranted, given how powerful the potential prejudice can be in the simulated depiction of human conduct, as noted in *Miller*. Accordingly, Pugh prays this Court reverses the Court of Appeals' decision and remands for harm analysis.

Respectfully Submitted,

/s/Rick Dunbar_____.

FREDERICK DUNBAR
Texas Bar No. 24025336
7242 Buffalo Gap Road
Abilene, Texas 79606
Telephone: 325/428.9450
Facsimile: 325/455.1912

JEFFREY A. PROPST
Texas Bar No. 24064062

CERTIFICATE OF COMPLIANCE

Appellant's Brief, according to the word count function of counsel for Appellant's word-processing software, contains 2142 words, even including those items permitted to be excluded, save for the Appendix. As this is within the limits established excluding these items, Appellant respectfully certifies compliance.

/s/Rick Dunbar
Rick Dunbar

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2019, a true and correct copy of the above and foregoing was forwarded upon Taylor County Appellate Assistant District Attorney Britt Lindsey and the State Prosecuting Attorney by e-service.

/s/Rick Dunbar
Rick Dunbar

APPENDIX

Opinion of the Texas Court of Appeals, Eleventh District, At Eastland.....A

A



In The

Eleventh Court of Appeals

No. 11-17-00216-CR

ALLEN BRAY PUGH, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 42nd District Court
Taylor County, Texas
Trial Court Cause No. 26281A**

MEMORANDUM OPINION

The jury convicted Appellant, Allen Bray Pugh, of the offense of murder and assessed his punishment at confinement for fifty years and a \$10,000 fine. In two issues on appeal, Appellant complains of (1) the admission of computer-generated, animated videoclips into evidence at trial and (2) the inclusion in the jury charge of an instruction on voluntary intoxication. We affirm.

Background Facts

Appellant does not challenge the sufficiency of the evidence to support his conviction. Therefore, we need not detail all of the evidence presented at trial. Generally speaking, the record shows that Appellant ran over William Keith Delorme as Appellant left the parking lot of a bar. Delorme's body was found in the parking lot sometime around 2:00 a.m. by a man walking his dog; Delorme died as a result of injuries sustained from being run over by a motor vehicle. Blood, hair, and tissue taken from the outside of Appellant's pickup matched Delorme's DNA.

Appellant asserted at trial that he had acted in self-defense and that he had not even realized that he ran over Delorme. According to Appellant's testimony, Delorme was coming at Appellant with a knife, so Appellant leaned over the console and "floored it" in an attempt to get away from Delorme. A knife was found in the parking lot not far from Delorme's body, and by all accounts, Delorme had pulled out a knife and threatened the bartender at the Lone Star Bar around closing time that night.

The jury heard much testimony about what had happened prior to Delorme being run over, including Delorme's strange behavior and Appellant's comments to the bartender and two others with respect to Delorme. According to the bartender, Appellant had said something like, "[I]f he tries to pull out that knife again, we'll put him under the car." The jury rejected Appellant's claim of self-defense and convicted Appellant of murder.

Analysis

In his first issue, Appellant argues that the trial court erred when it admitted three computer-generated, animated videoclips into evidence. Each of the three videoclips lasts less than eight seconds and shows an animated recreation of the incident based on the State's theory of how it occurred. The only difference in the

videoclips is the vantage point depicted in them: one is a bird's eye view, one is a view toward the northeast, and the other is a view toward the southwest. Appellant argues that the exhibit containing the three videoclips should have been excluded from evidence because the animation was speculative and because the probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury. *See* TEX. R. EVID. 403.

Appellant filed a motion to suppress the animation. The trial court held a hearing on Appellant's motion prior to the commencement of the jury trial. At that hearing, two expert witnesses testified about the scene and the making of the animation. Officer David Thompson Jr., a certified accident reconstructionist, testified that he went to the scene and observed the markings left in the caliche by a vehicle. He testified that those markings "were indicative of acceleration." Officer Thompson testified about the markings and the location of the markings, which began near the northwest corner of the Lone Star Bar and went in a southerly direction toward another bar. Officer Thompson used a laser, a data encoder, and a data collection device in addition to a computer software program to create a visual representation of the scene. Officer Thompson testified that he used the "FARO" computer program in this case.

Officer Tyson Kropp, also a certified accident reconstructionist, testified similarly to Officer Thompson about the reconstruction of an accident, but he explained the use of "FARO HD" in more detail. Officer Kropp created the animation using the data that was gathered by officers that went to the scene. Using that data, he imported a Google maps image over the points from the collected data. Officer Kropp also relied on DNA evidence, forensic evidence, photographs, and the autopsy report in the creation of the animation. Officer Kropp did not attempt to determine what Delorme was doing prior to being run over, but he was able to orient

Delorme in the animation based upon the medical examiner's opinion that the injuries sustained were on the left side of Delorme's body. Officer Kropp acknowledged that he could not accurately depict what Delorme was doing or Delorme's exact location in the parking lot when he was struck. However, based on the location of the forensic evidence and the rub marks underneath Appellant's pickup, Officer Kropp was able to determine what part of the pickup drove over Delorme. Blood from Delorme was on the left front tire, and hair and tissue was found on the undercarriage under the front end of the pickup. Approximately eighty-five feet of acceleration marks led to the location where the body was found. Furthermore, Officer Kropp testified that he did not believe it was possible for Delorme to have been beside Appellant's pickup when the pickup made contact with Delorme.

At the hearing on Appellant's motion to suppress, the trial court was shown an exhibit that contained four videoclips, each of which depicted the computer-generated animation from a different vantage point. The trial court sustained Appellant's objections with respect to the first-person vantage point and overruled Appellant's objections with respect to the other three vantage points. During trial, Appellant renewed his objections when the State offered an exhibit containing the videoclips of the animation from the three vantage points previously okayed by the trial court. The trial court overruled Appellant's renewed objections, gave a limiting instruction to the jury, and permitted the exhibit to be played for the jury. In its limiting instruction, the trial court informed the jury that the "animation is a visualization of the expert's opinion" and "may be considered by the jury only to the extent that the jury believes beyond a reasonable doubt that other evidence introduced by the State supports the events as depicted in the animation."

We review a trial court's ruling on the admissibility of evidence under an abuse of discretion standard of review. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). Under this standard, we must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Id.*; *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991).

Appellant's argument focuses on the fact that the animation did not base Delorme's demeanor or behavior on any scientific information. Appellant asserts that "Delorme was portrayed in the animation as stationary and unarmed," which contradicted Appellant's testimony that Delorme was lunging toward Appellant with a knife. In support of his assertion regarding animations that involve animate objects, Appellant points to this quote: "[A]ny staged, re-enacted criminal acts or defensive issues involving human beings are impossible to duplicate in every minute detail and are therefore inherently dangerous, offer little in substance and the impact of re-enactments is too highly prejudicial to insure the State or the defendant a fair trial." *Miller v. State*, 741 S.W.2d 382, 388 (Tex. Crim. App. 1987) (quoting *Lopez v. State*, 651 S.W.2d 413, 416 (Tex. App.—Fort Worth), *pet. granted, case remanded*, 664 S.W.2d 85 (Tex. Crim. App. 1983), *op. withdrawn by Lopez v. State*, 667 S.W.2d 624 (Tex. App.—Fort Worth 1984, no *pet.*)); *see also Lewis v. State*, 402 S.W.3d 852, 862–66 (Tex. App.—Amarillo 2013) (finding error, but harmless error, in the admission of an animation that attempted to portray the actions of at least four persons when many of the details contained in the animation "were provided by nothing more than pure speculation"), *aff'd*, 428 S.W.3d 860 (Tex. Crim. App. 2014).

While we do not disagree with the quoted language from *Miller*, we do not believe that it controls the admission of the animation in the case before us. The use of an animation to recreate the scene of an accident has been approved not only by

this court but also by some of our sister courts as long as the animation is based on objective data. *See, e.g., Venegas v. State*, 560 S.W.3d 337, 347–48 (Tex. App.—San Antonio 2018, no pet.); *Castanon v. State*, No. 08-15-00225-CR, 2016 WL 6820559, at *3 (Tex. App.—El Paso Nov. 18, 2016, no pet.) (not designated for publication); *Murphy v. State*, No. 11-10-00150-CR, 2011 WL 3860444, at *2 (Tex. App.—Eastland Aug. 31, 2011, no pet.) (mem. op., not designated for publication); *see also Mendoza v. State*, No. 13-09-0027-CR, 2011 WL 2402045, at *14–15 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op., not designated for publication) (involving a 3D diagram). Although the animation in the present case depicted an accident recreation that involved both a motor vehicle and a pedestrian, the testimony showed that the animation was based on objective data and that it did not attempt to portray Delorme’s actions prior to being run over by Appellant’s pickup.

Having viewed—several times—all three videoclips in the exhibit and having reviewed the testimony from the witnesses at the hearing on the motion to suppress and at trial, we cannot hold that the trial court abused its discretion when it admitted the animation into evidence. According to the testimony of the expert witnesses, the animation was a computer-generated recreation based on objective data and measurements obtained from the scene, objective evidence obtained from Appellant’s pickup, and the autopsy findings. In each of the three videoclips admitted into evidence, the scene is depicted from a distance and shows nothing gruesome. We hold that the trial court did not abuse its discretion by admitting the exhibit containing these three videoclips into evidence over Appellant’s objections that the animation depicted in the exhibit was speculative and unfairly prejudicial. We overrule Appellant’s first issue.

In his second issue, Appellant contends that the trial court erred by including the following instruction in the jury charge at the guilt/innocence phase of trial: “Voluntary intoxication is not a defense to the commission of a crime.” Appellant contends that it was error to give such an instruction because there was no evidence adduced at trial to indicate that Appellant was intoxicated.

The Texas Penal Code provides that voluntary intoxication “does not constitute a defense to the commission of [a] crime.” TEX. PENAL CODE ANN. § 8.04(a) (West 2011). The Court of Criminal Appeals has held that, “if there is evidence from any source that might lead a jury to conclude that the defendant’s intoxication somehow excused his actions, an instruction [pursuant to Section 8.04(a)] is appropriate.” *Taylor v. State*, 885 S.W.2d 154, 158 (Tex. Crim. App. 1994) (upholding the giving of an instruction on voluntary intoxication even though the evidence that the defendant’s actions were precipitated by marihuana use was “slight”). The evidence need not unequivocally establish that the defendant was intoxicated at the time of the offense in order for the trial court to give an instruction on voluntary intoxication and thereby prevent potential jury confusion on that issue. *Sakil v. State*, 287 S.W.3d 23, 27 (Tex. Crim. App. 2009).

The record reflects that Appellant had consumed alcohol that night. The bartender testified that “everybody had had a little bit of alcohol at this point.” She indicated that Appellant “was fine” though and had only had “a couple drinks and a couple shots” at the Lone Star Bar. Appellant testified at trial that he had drunk “a couple” of “Smirnoffs,” which he described as “a flavored malt beer,” at a neighboring bar. Additionally, during an interview with the police, Appellant stated that he had had two “Crown and Cokes” and “shooters” but that he was not intoxicated. Because there was some evidence in this case that might have led the jury to believe that Appellant was intoxicated and that his intoxication excused his

actions, the trial court did not err when it instructed the jury on voluntary intoxication pursuant to Section 8.04(a) of the Penal Code. *See id.* We overrule Appellant's second issue.

This Court's Ruling

We affirm the judgment of the trial court.

KEITH STRETCHER
JUSTICE

August 30, 2019

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.¹

Willson, J., not participating.

¹Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.